

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**T.J., Appellant**

**and**

**U.S. POSTAL SERVICE, NORTH METRO  
FACILITY, Duluth, GA, Employer**

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**Docket No. 21-0586  
Issued: September 30, 2021**

*Appearances:*

*Misty Wenger, for the appellant<sup>1</sup>*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge

JANICE B. ASKIN, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On March 4, 2021 appellant, through her representative, filed a timely appeal from a December 21, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated November 21,

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

2019 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.<sup>3</sup>

### **ISSUE**

The issue is whether OWCP properly denied appellant's December 17, 2020 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

### **FACTUAL HISTORY**

On October 4, 2019 appellant, then a 54-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on October 8, 2016 she sustained injuries to her right side due to falling out of her postal vehicle while in the performance of duty. She did not stop work.

In a statement dated October 4, 2019, appellant indicated that on October 8, 2016 she was exiting her postal vehicle when her foot missed the bumper, causing her to fall backward onto her hand in an attempt to break her fall. She tried to treat her symptoms at home initially, and then sought chiropractic care due to ongoing numbness and tingling in her right hand, shoulder and leg. Appellant noted that she was subsequently referred to a medical doctor and continued to work despite ongoing pain in her shoulder and lower back.

In support of her claim, appellant submitted medical evidence including treatment notes from Dr. Jason R. Hoover, a chiropractor, dated October 17 through November 29, 2016 for neck and back pain. Appellant also included a medical note dated September 30, 2019 from Dr. Fiona Baldwin, a family practitioner, indicating that she reported recurrent neck, shoulder and low back pain and hip pain for three years following a fall at work in October 2016. Dr. Baldwin diagnosed low back, hip, and neck pain.

In development letters dated October 15 and 29, 2019, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence necessary, and requested a narrative medical report from her treating physician containing a detailed description of findings and a diagnosis, explaining how her work activities caused, contributed to, or aggravated her medical conditions. It afforded appellant 30 days to submit the necessary evidence.

In a November 8, 2019 medical note, Dr. Baldwin indicated that appellant reported recurrent neck, shoulder, low back, and hip pain due to a fall at work in October 2016, and that she had undergone magnetic resonance imaging studies which showed chronic tendinitis and bursitis of the right shoulder and degenerative disease of the cervical and lumbar spine and knees. She provided diagnoses of bursitis and tendinitis of the right shoulder and degenerative disease of

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<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the December 21, 2020 decision, OWCP received additional evidence. The Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

the cervical spine, lumbar spine, and knees. Dr. Baldwin opined that it would be reasonable to assume that appellant's conditions stem from her history of a fall and were aggravated by ongoing repetitive job duties such as bending, twisting, and reaching.

In a separate statement dated November 13, 2019, appellant provided additional details regarding her treatment.

By decision dated November 21, 2019, OWCP denied appellant's traumatic injury claim, finding that she had not submitted medical evidence containing a medical diagnosis in connection with her accepted employment incident. It concluded that the requirements had not been met to establish an injury on October 8, 2016 causally related to the accepted employment incident.

OWCP continued to receive medical evidence, including a December 7, 2020 report of Dr. Miguel E. Stubbs, an internal medicine specialist, who recounted the history of the accepted October 8, 2016 employment incident, as well as subsequent occupational disease claims. Dr. Stubbs opined that the October 2016 injury caused limitations on her ability to perform her job duties and that repetitive strain injuries over time due to highly repetitive work activities such as reaching, pushing, pulling, lifting, and carrying compounded those injuries.

On December 17, 2020 appellant requested reconsideration of OWCP's November 21, 2019 decision.

By decision dated December 21, 2020, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. It referenced the reconsideration request and a report from Dr. Stubbs dated December 7, 2020.

### **LEGAL PRECEDENT**

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.<sup>4</sup> This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>5</sup> Timeliness is determined by the document receipt date, *i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS).<sup>6</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>7</sup>

When a request for reconsideration is untimely, OWCP undertakes a limited review to determine whether the request demonstrates clear evidence that OWCP's most recent merit

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<sup>4</sup> 5 U.S.C. § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

<sup>5</sup> 20 C.F.R. § 10.607(a).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

<sup>7</sup> *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

decision was in error.<sup>8</sup> OWCP's procedures provide that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's request for reconsideration demonstrates "clear evidence of error" on the part of OWCP.<sup>9</sup> In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>10</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>11</sup> The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP. To demonstrate clear evidence of error, the evidence submitted must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.<sup>12</sup>

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face demonstrates that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.<sup>13</sup> The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>14</sup>

### ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed.

The last merit decision was issued on November 21, 2019. As her request for reconsideration was not received by OWCP until December 17, 2020, more than the one-year time

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<sup>8</sup> See 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499 (1990).

<sup>9</sup> *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). See also 20 C.F.R. § 10.607(b); *supra* note 6 at Chapter 2.1602.5 (February 2016).

<sup>10</sup> *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>11</sup> *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 6 at Chapter 2.1602.5(a) (February 2016).

<sup>12</sup> *C.M.*, Docket No. 19-1211 (issued August 5, 2020).

<sup>13</sup> *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 6 at Chapter 2.1602.5(a) (February 2016).

<sup>14</sup> *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

limitation, pursuant to 20 C.F.R. § 10.607(a), the Board finds that the request for reconsideration was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying the claim.<sup>15</sup> The Board further finds that, in its December 21, 2020 decision, OWCP summarily denied appellant's request for reconsideration without complying with the review requirement of FECA and its implementing regulations.<sup>16</sup> As noted above section 8124(a) of FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.<sup>17</sup> Its regulations at 20 C.F.R. § 10.126 provide that the decision of the director of OWCP shall contain findings and facts and a statement of reasons.<sup>18</sup> As well, OWCP's procedures provide that the reasoning behind OWCP's evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.<sup>19</sup> In the December 21, 2020 decision, it denied appellant's December 17, 2020 reconsideration request, finding it was untimely filed as it was received more than a year following the most recent merit decision dated November 21, 2019. It referenced the reconsideration request and a report from Dr. Stubbs dated December 7, 2020, but failed to analyze this evidence as to whether it was sufficient to demonstrate clear evidence of error.

The Board will therefore set aside OWCP's December 21, 2020 decision and remand the case for findings of fact and a statement of reasons, to be followed by an appropriate decision on appellant's untimely reconsideration request.

### **CONCLUSION**

The Board finds that appellant's request for reconsideration was untimely filed. The Board further finds that the case is not in posture for decision regarding whether appellant has demonstrated clear evidence of error.

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<sup>15</sup> 20 C.F.R. § 10.607(b); *S.C.*, Docket No. 20-1537 (issued April 14, 2021); *R.T.*, Docket No. 19-0604 (issued September 13, 2019); *see Debra McDavid*, 57 ECAB 149 (2005).

<sup>16</sup> *See Order Remanding Case, W.D.*, Docket No. 20-0859 (issued November 20, 2020); *Order Remanding Case, C.G.*, Docket No. 20-0051 (issued June 29, 2020); *Order Remanding Case, T.P.*, Docket No. 19-1533 (issued April 30, 2020); *see also* 20 C.F.R. § 10.607(b).

<sup>17</sup> 5 U.S.C. § 8124(a).

<sup>18</sup> 20 C.F.R. § 10.126.

<sup>19</sup> Federal (FECA) Procedure Manual Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5 (February 2013) (all decisions should contain findings of fact sufficient to identify the benefit being denied and the reason for the disallowance).

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 21, 2020 decision of the Office of Workers Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 30, 2021  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board